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Governor

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Finance and Administration Cabinet
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Jonathan Miller
Secretary

November 9, 2010

No. 10-29

John Reese, CEO
Docufide, Inc.
1990 S. Bundy Dr., Suite 790
Los Angeles, CA 90025

RE: Determination of Protest: RFP 075 1000000683 (Electronic Transcript Initiative).

Dear Mr. Reese:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of Docufide, Inc. ("Docufide") relating to RFP 075 1000000683 ("RFP") for the "Electronic Transcript Initiative."

FACTUAL BACKGROUND

The Kentucky Higher Education Assistance Authority ("KHEAA") issued the RFP on June 24, 2010. The intent of the RFP was to seek a service provider "to facilitate the transfer of student information between Kentucky's public and private high schools to Kentucky's public and private colleges and universities in a consistent electronic format." RFP, I ("Description of Services Required"). In addition, it was "highly desirable" that the proposed system "to the maximum extent possible" incorporate national schemas and standards" and that individual course information be separately identified and recorded. *Id.* The RFP closed on July 9, 2010. After an evaluation, XAP Corporation ("XAP") was awarded 245 total points; Docufide was awarded 198 total points.

On September 7, 2010, Docufide filed a written protest. Docufide raises three grounds for protest: (1) the proposal submitted by XAP was non-responsive; (2) the evaluation process was not fair and equitable since it compared a non-compliant system offered by XAP to a compliant system offered by Docufide; and (3) the RFP was misleading since it did not indicate that non-compliant systems would be considered. On September 21, 2010, XAP filed a response. On September 23, 2010 KHEAA filed its response.

For the reasons stated herein, this protest is DENIED.

DETERMINATION

After a review of the solicitation, the applicable statutes and regulations, the protest, and other relevant information, the Secretary of the Finance Cabinet ("Secretary") finds and determines as follows:

Any actual or prospective bidder who is aggrieved in connection with the solicitation or selection for award of a contract may file a protest with the Secretary of the Finance Cabinet. KRS 45A.285. Docufide submitted a proposal in response to the RFP. However, there has been no award. Thus, the portions of Docufide's protest that relate to the award are not ripe for decision since no award has been made. The remaining portion of the protest, relating to the solicitation, shall be addressed in full.

A protest must be filed promptly and, in any event, within fourteen (14) calendar days after the aggrieved person *knows or should have known* of the facts giving rise thereto. KRS 45A.285(2). In this case, the Solicitation was promulgated on June 24, 2010. Docufide filed its protest on September 7, 2010. The protest as to the Solicitation, therefore, was filed in an untimely manner.

Here, Docufide raises three grounds for protest: (1) the proposal submitted by XAP was non-responsive; (2) the evaluation process was not fair and equitable since it compared a non-compliant system offered by XAP to a compliant system offered by Docufide; and (3) the RFP was misleading since it did not indicate that non-compliant systems would be considered. All three grounds of protest arise from the fact that XAP offered an image-based "PDF" system of transcript transmission whereas Docufide offered a more technologically sophisticated system of transcript transmission.

Applying these general rules to the specific grounds of protest, the Secretary finds as follows:

Grounds #1 and #2 of Docufide's protest are not ripe for decision by this Determination as no award has been made. Once an award has been made, these two grounds will be ripe for adjudication. See KRS 45A.285.

Docufide's third ground of protest differs from the first two, this ground of protest relates to the form of or content of the solicitation document. A protest to a solicitation should be filed *before* the protestor actually submits a bid or proposal. Once a party submits a bid or proposal to a solicitation and the bids are opened, the protestor then has waived all objections to the solicitation document not previously raised. See 4 C.F.R. §21.2(a)(1) ("Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals."); *Parsons Precision Products, Inc.*, Comp. Gen. B-249940, 92-2 CPD ¶ 431 ("a bidder who participates in a procurement through the point of bid opening without objection is deemed to have acquiesced in the agency's statement of the terms and conditions.")

The Secretary finds that Docufide has waived this ground of protest by submitting a proposal.

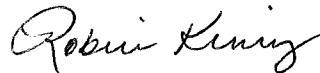
Accordingly, upon review of the record, the protest of Docufide either is not ripe for adjudication, has been waived or is untimely. Further, the presumption of correctness in KRS 45A.280 applies and Docufide has

failed to provide sufficient evidence to overcome this presumption. Since there is no basis to overturn this procurement, the protest must be **DENIED**. Pursuant to KRS 45A.280:

The decision of any official, board, agent, or other person appointed by the Commonwealth concerning any controversy arising under, or in connection with, the solicitation or award of a contract, shall be entitled to a presumption of correctness and shall not be disturbed unless the decision was procured by fraud or the findings of fact by such official, board, agent or other person do not support the decision.

In accordance with KRS 45A.285 (4), the decision by the Secretary shall be final and conclusive.

For the Secretary
Finance and Administration Cabinet
By Designation

A handwritten signature in cursive script, appearing to read "Robin Kinney".

Robin Kinney
Executive Director
Office of Administrative Services

cc: Diana L. Barber,
General Counsel, KHEAA

J. Michael Thompson,
CEO, XAP Corporation